

**Maestro Cafe Associates, Ltd. and Local 6, Hotel,
Restaurant and Club Employees & Bartenders
Union, AFL-CIO, Case 2-CA-18505**

30 April 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 29 September 1983 Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Maestro Cafe Associates, Ltd., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by setting up a discriminatory and overly broad rule based on its warning to an employee that it was illegal to talk about the Union at work. However, in finding the rule overly broad we do not rely, as did the judge, on *T.R.W. Division*, 257 NLRB 442 (1981), which was overruled in *Our Way, Inc.*, 268 NLRB 394 (1983). Rather, we conclude that the Respondent's rule was overly broad because it appeared to include a ban on discussing the Union on the employees' own time in nonpublic areas of the restaurant. See *Marriott Corp.*, 223 NLRB 978 (1976).

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on January 26, 27, and 28 and March 2 and 3, 1983. The complaint dated February 10, 1982, alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees, created an impression of surveillance, directed its employees to cease discussing the Union, threatened its employees, and discharged its employee

Joanne Pilliteri because she supported the Union. Respondent denies the material allegations of the Complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after due considerations of the briefs filed by the parties in May 1983, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York limited partnership located in New York City, operates a public restaurant and annually derives gross revenues in excess of \$500,000 and purchases goods and materials valued in excess of \$50,000 indirectly in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.¹

II. THE ALLEGED UNFAIR LABOR PRACTICES

The following are supervisors and agents of Respondent:²

Emanuel (Manny)	General Manager
Katz	Manager-Owner
Morty Katz	Assistant Manager
Evelyn Wing	Night and Bar Manager
John Tree	

The evidence shows that the Union commenced organizing Respondent's employees in October 1981, and filed a petition with the Board on November 3, 1981. The election was held on January 13, 1982.

The restaurant, located near Lincoln Center in New York City, was open 7 days per week from 12 noon until about 1 a.m. The restaurant employed about 62 employees including 35 waiters, waitresses, and busboys, and 4 hosts were supposed to supervise the waiting staff, ensuring that they were neatly dressed, that they covered their stations and were prompt. One host, Lawrence Watson, was given the duty of making up the schedule for the waiting staff; he also interviewed job applicants and recommended the hiring of employees. Hosts could not send employees home if business was slow, only floor managers could do that.³ The waiters, waitresses, and busboys were generally part-time employees; many of them were aspiring actors, dancers, and designers pursuing studies in their respective fields.

Because of the fact that the waiters and waitresses often had commitments to their studies or other activities, they were permitted to obtain substitutes to cover their shifts. Each week, a schedule of shift and station assignments would be posted. This schedule had blanks for the listing of substitutes.

¹ On June 24, 1982, Respondent sold its interest in the restaurant.

² This decision will refer to Emanuel Katz as Katz; where Morty Katz is referred to, his full name will be indicated.

³ Floor managers were Emanuel Katz (the general manager), Evelyn Wing, and John Tree.

Katz testified that, if a waiter or waitress wanted time off from a scheduled shift, he or she was responsible for obtaining a substitute and indicating the identity of the substitute on the schedule. If the substitute did not show up for work, the employee whose shift it was would be held ultimately responsible. This rule applied even if an employee could not work due to illness. According to Katz, the penalty for failing to arrange coverage for one's own shift was discharge. He testified that, when employees were hired, he informed them of this rule and advised them to take a list of all the other employees home so that they could arrange coverage if it became necessary. Katz stated that he may have excused a failure to cover one's shift once or twice in 2 years if it were due to a death in the family or in case of illness if the employee called him and he could assess the situation.⁴

Katz testified, and the record shows, that different rules applied to cooks who were full-time professionals. It was hard to find a good cook, and rules governing excusable absences as well as other conditions of employment were different for kitchen employees and were more lenient than the rules governing the waiting staff.

Every night before the dinner hour, Wing or Katz conducted a meeting to inform the waiters and waitresses of the evening's specials and other matters and, every 2 months or so, Katz conducted a staff meeting.

A. The October 1981 Staff Meeting

Joanne Pillitteri, a waitress at the Maestro since its opening in 1980, testified that in October 1981 she attended a staff meeting where management discussed the speed of service, menus, and the like. After about 1-1/2 hours, Pillitteri stated, she raised her hand and complained about various things: There was poor communication between the staff and management, rules were unclear, there was a lot of tension, it was difficult to get food out of the kitchen quickly, employee meals were inadequate, holidays were not allotted on the basis of seniority, and the locker room was dirty and unheated. According to Pillitteri, Katz asked her why she remained at the Maestro if she had all these complaints and Pillitteri said that she liked the place and "enjoyed management" socially and had strong friendships with her coworkers. She also told Katz that she had worked in union and nonunion "houses" and that he did not give his own employees enough credit although some of them were far better than some career waiters she had worked with. Pillitteri estimated that she spoke for about 20 minutes. Another waitress, Janet Pennybacker, then raised her hand, agreed that the Maestro was a nice place to work and said that she had also worked as a union member and that Respondent's employees were a "very competent crew." After the meeting Katz pointed at Pillitteri and, smilingly, said, "alright for you, I'll get you for this." Pillitteri testified that she believed and still does believe that Katz was making a joke.

Based on the testimony of all the witnesses, I find that Pillitteri's description of the meeting was essentially correct. All of the other witnesses generally corroborated

Pillitteri's account, agreeing that she spoke for 10 to 15 minutes and raised a number of complaints. It also appears that other employees spoke after Pillitteri and that they generally supported her comments. Katz commented that the staff should discuss these problems with him and said employees should seek him out.

One week to the day of the staff meeting, on a Wednesday, Pennybacker phoned Pillitteri at home and informed her, in case she did not know what was going on, that people had been signing pledges for the Union. Pennybacker asked Pillitteri to sign a card and, on October 28, Pennybacker gave her a card at another restaurant. Pillitteri took it to work with her and signed it on the loading dock.⁵

The exact date of the staff meeting was not established at the trial herein. I find that it occurred in early to mid-October 1981.

B. Events of October 30, 1981

On October 30, 1981, Western Union telephoned the restaurant and read a nightwire from the Union informing Respondent that the Union represented a majority of its employees and requesting negotiations. Katz testified that this was the first he had heard about a union and that he was "shocked by it."

Pillitteri testified that on Friday, October 30, at around 8 or 8:15 p.m. Katz asked her to come over to a table where he was seated with Morty Katz. Waitress Mary Lee Stevens was also asked to come over, and Pennybacker was standing at the table. Morty Katz asked Pennybacker if she had joined the Union and she said, "you can't ask me that, stop harassing me." Then Morty Katz asked Pillitteri if she had signed for the Union, and she said, "No." After this, Pillitteri heard Morty Katz ask Mary Lee Stevens the same question. Stevens replied, "you can't ask me that." Pillitteri saw Katz call other waitresses over to the table during the evening. According to Pillitteri, before this conversation she was "very friendly" with Manny Katz, having dinner with him occasionally and visiting his summer home. Pillitteri claimed that, after this conversation, Katz did not speak to her again. She was sure that Katz' attitude did not change after the October staff meeting—it changed after the October 30 telegram.

Cynthia Reed, a waitress at the Maestro, testified that, on the night the telegram was received, Manny and Morty Katz called her over to a table and asked her if she had signed a petition or a card for the Union. She said "yes" and then they sent her back to work.⁶

Waitress Mary Lee Stevens testified that on the night of the telegram, about 7:30 or 8 o'clock, Manny Katz called her over to a table in the dining room and asked her if she had signed a petition or card from the Union.⁷ She said she did not know. He asked again and she repeated the same answer. Then he asked "Cindy" if she had signed and she said, "yes." Then Katz asked Stevens again. When she said she did not know, Morty Katz said,

⁵ The card is dated 10-29-81.

⁶ I find that Reed was a reliable witness and I credit her testimony.

⁷ Stevens was a frank witness who made an effort to recall accurately and answer questions helpfully. I credit her testimony.

⁴ This testimony was contradicted by other evidence as will be seen below.

"It's obvious that she signed." Stevens was sure Manny and not Morty interrogated her.

Katz denied questioning any of his employees. Morty Katz did not testify in the instant proceeding.

It is evident that the three waitresses disagree somewhat as to what occurred when they were called over. Pillitteri testified that Morty Katz questioned her, Pennybacker, and Stevens.⁸ Stevens testified that Manny Katz asked questions of her and of Reed. Reed stated that both Manny and Morty Katz questioned her. Pillitteri claims that Stevens replied "you can't ask me that," while Stevens herself testified that she said "no." Both Reed and Stevens stated that Reed admitted signing a card for the Union. While the testimony disagrees in the above-mentioned respects, I am convinced that the interrogations did indeed take place.⁹ I find that both Manny and Morty Katz were seated at a table and called the waitresses over to ask them if they had signed for the Union. It is not significant that over a year later the witnesses could not recall which of the two men asked questions or precisely what answers were given. Further, I find it significant that Morty Katz did not appear at the trial to deny the allegations against him.

These interrogations, conducted by the two most important figures in Respondent's management, were designed to elicit specific information about the allegiance and activities of each waitress questioned and reasonably tended to interfere with the rights of employees under the Act. I find that Respondent violated Section 8(a)(1) of the Act by interrogating Pillitteri, Stevens, and Reed.

C. Alleged Threats to Deborah Burman

Deborah Burman, a waitress at the Maestro, testified that in early January 1982 Katz spoke to her as she was leaving the Maestro. Burman testified:

[Katz said] if the union was to come in . . . we would have all of our benefits taken away, meaning we would have to work a full time schedule, 5 days a week. We wouldn't be able to leave at eight o'clock without working a full shift, a full eight hours. We wouldn't be able to have substitutes. He said the Union would be to the disadvantage of most of the people who worked there since most of the people were actresses and actors, they needed a day off here and there. That it would work to their disadvantage. That the union was only for professional waiters and waitresses. I told him I had not decided if I was for the union or against it. I had not taken a position either way, and he said, well, fine, I just want you to know what's really going to happen when they come in here.

Two days later, Katz called her into the office and told her that he was disappointed in her because he had heard that she repeated the comments which he had made in confidence. Then Katz reiterated that the Union would take away all the benefits and that she would not last

under those conditions. Katz said he would use the employees' flexible schedules as a negotiation tactic and that they would all have to work a full schedule. Katz said he was disappointed in Pillitteri and other employees.

On cross-examination, Burman recalled that Katz said he did not know if she supported the Union and that he wanted her to hear the other side of the story. Katz said all benefits are negotiable and he would use benefits such as scheduling as a negotiating tactic. Katz said the Union would impose uniform regulations and as a result the employees would lose benefits by having to work full-time schedules. The Union would make the employees work lunches and keep a full-time schedule as part of its "package" which would be presented during negotiations. Katz said under the Union the more senior employees would pick their shifts but that all employees might be forced to work lunches.

Katz recalled speaking to Burman a week or two before the election. He told her "since she and I were again friendly" that he wanted to discuss the pros and cons of the Union with her. Burman was in law school. He told her the Union was for people who could not take care of themselves. If the Union came in, she might lose whatever gains she had made because "everything would start from zero and we would negotiate." If union seniority was a part of a new scheduling policy, the less senior staff would have to work lunches and would get fewer tips. This would lead to greater turnover and senior staff might have to work days too. He did not tell Burman she would have to work a fixed schedule. He called her in several days later to complain that she had distorted his words in relating them to other employees. He had never told her that all her benefits would be taken away.

All of Burman's testimony taken together, as modified by her cross-examination, shows that Katz told her that schedules would be negotiated by the Union and Respondent and that they would be part of the tactics used by each side. Further, he told her that the Union, being an organization for professionals, would seek to impose a uniform work schedule and that this would result in less flexibility for the aspiring actors on the staff. Katz did not tell Burman that Respondent would unilaterally deprive employees of the benefits of its present flexible scheduling. Instead, he predicted that the Union would seek uniformity and seniority in scheduling and that this would be to the disadvantage of the present staff. Katz' statements adequately informed Burman that scheduling would be part of the negotiations and I can find no implied threat that Respondent would rescind its employees' benefits if the Union came in. Thus I do not find that Katz' statements to Burman violated Section 8(a)(1) of the Act. *Wed-Tex of Headland*, 236 NLRB 1001, 1004 (1978); *Ludwig Motor Corp.*, 222 NLRB 635, 636 (1976).

D. Alleged Interrogation of Arlene Monahan

On the Saturday afternoon after the union telegram was read to the Maestro management, Assistant Manager Evelyn Wing asked waitress Arlene Monahan if she knew anything about the telegram. Monahan said noth-

⁸ Pennybacker did not testify in this proceeding.

⁹ I find that Pillitteri did not recall this incident as accurately as did Stevens and Reed. As will be discussed below, Pillitteri was not always a reliable witness.

ing, and Wing asked if she had signed a card. Wing also asked whether the waitresses had been talking about the Union but Monahan did not answer.

Wing did not testify in the trial and the testimony is thus unrefuted.

I find that Respondent violated Section 8(a)(1) of the Act by interrogating Arlene Monahan. Wing was an important managerial figure at the Maestro and she asked for specific information about certain protected activities. Her questions would reasonably tend to interfere with employees' rights under the Act.

E. Alleged Warning to Mary Lee Stevens

Mary Lee Stevens testified that about a week before the election she was talking to another waitress in the dining room when Manny Katz called her over to the bar and asked her if she was talking about the Union. Stevens shrugged and Katz then said it was illegal to talk about the Union at work. Stevens acknowledged that the Maestro had a rule against waiters and waitresses congregating on the dining room floor and talking. Katz testified about this rule and acknowledged its enforcement, but denied applying it only to union talk or mentioning the Union to Stevens. Many of the witnesses testified about this rule; it seems clear that the Maestro made constant efforts to keep members of the waiting staff at their own stations even if they were not particularly busy. Employees were often told to "break it up" when they stood talking during working hours, but management's efforts were not consistently successful. Further, a conversation might be tolerated if it involved only two employees and not a group. While there is nothing unlawful about a no-talking rule, if Katz did tell Stevens or imply to her that she could not talk to a fellow employee because she was discussing the Union, such a statement would be unlawful. I credit Stevens' version of this incident,¹⁰ and I find that Respondent violated Section 8(a)(1) of the Act in that Katz interrogated Stevens about her conversation and in that Katz warned her that it was illegal to talk about the Union at work. The warning not to discuss the Union set up a discriminatory no-solicitation rule and an overly broad rule as well. See *T.R.W. Bearings*, 257 NLRB 442 (1981).

F. Discharge of Pillitteri

Pillitteri testified that, some weeks before Christmas 1981, she posted a notice requesting substitutions for the evening of December 24, 1981; however, no one volunteered to work her shift. Pillitteri stated that she told John Tree several times that she had obtained no substitute but that she could not be there because she was going to church and going to see her father. She mentioned the subject on December 23 after Tree said, "We'll see you tomorrow," and Tree then replied, "Okay, okay, have a nice Christmas, love to your father."¹¹ On another occasion, before Thanksgiving,

Pillitteri had asked Tree what he thought would happen if she did not work on Christmas Eve and he said that he did not know. Then Tree said, "You know how Manny feels about family, we protect family." On December 23, Pillitteri spoke to Hostess Barbara Maxon about her dilemma informing her that she was going to midnight Mass with her father. Pillitteri told Maxon she would call in the next evening.

On December 24, Pillitteri testified, she called the Maestro between 4:30 and 5 p.m. and spoke to host Lawrence Watson. Katz was not available. Pillitteri told Watson that she would not lie and say she was sick, that no one had offered to substitute for her, that she believed the Maestro would not be very busy that night and that "I feel it's my obligation to go home, go to church, and see my father." Watson asked if she was sure she wanted to do that and then wished her a good Christmas. Pillitteri was discharged by a telegram dated December 28, 1981, which stated that "contrary to company policy, you did not report for work as scheduled on December 24, 1981, or obtain a replacement." On December 28, she called Tree to ask about her discharge. Tree did not know anything about it. He said he had heard Katz say that "they wouldn't let the whole thing just go by and they were talking about suspension." Tree then asked Pillitteri who started the Union and whether she thought her discharge had anything to do with that meeting. Tree told her that business had been slow Christmas Eve and that the Maestro had closed at 10:30 p.m. Pillitteri did not ask him to intercede for her.

On cross-examination, Pillitteri testified that she had posted her notice requesting a substitute before the staff meeting in October. However, from that time until Christmas Eve she did not ask Katz for permission to be absent. She stated that the drive to her father's house was about 1 hour and 10 minutes. On December 24, her brother's car was not working and he was trying to rent a car; as it happened, she went neither to her father's nor to Mass. She did not consider taking the train to her father's.

Pillitteri acknowledged being told that her shift was her own responsibility, but she denied ever hearing that she could be discharged for failing to cover her shift. She thought she might be reprimanded or suspended for missing a shift. She testified that she anticipated a slow night at the Maestro. She knew if it was slow, she would be allowed to leave early, and if she had been released at 10 p.m. she could have gone to mass.

In 1980, Pillitteri had spoken to Katz about drawing up a seniority list for the purpose of choosing shifts and days off. The two discussed the subject several times in 1980 and 1981. Seniority was an important issue to Pillitteri and she mentioned it at the October staff meeting. She also mentioned it to John Tree who was sympathetic to many of her complaints. Pillitteri denied telling Maxon or Tree that she felt that she would have the day off on Christmas Eve 1981.¹²

¹⁰ As stated above, I found Stevens to be a credible witness. I do not believe Katz had a specific recollection of the incident in question.

¹¹ Pillitteri's testimony on this point was shifting, evasive, and unclear. It is not clear to me that Pillitteri actually remembered the events to which she was testifying.

¹² Pillitteri was a difficult witness to cross-examine. She tried to avoid answering counsel's questions and constantly tried to change the import of the questions. She often testified about union matters when the ques-

Continued

Watson testified that he was on duty as host on December 24, 1981. Pillitteri was scheduled to report for work at 5 p.m. At 4:50 p.m. Pillitteri called him and informed him that she would not be working that evening. Pillitteri said she had spoken to Barbara and had posted a substitution sheet which nobody had filled in. She said, "I have been invited out to my father's house for the holiday, and, fuck it, I am going to go. And If Manny wants to fire me, that's fine." Pillitteri went on to say that she had seniority and that management should cover her shift. Then Watson wished her a happy holiday and they hung up. About 7:45 p.m., Watson informed Katz about this conversation and, at the latter's request, put the substance of the conversation in writing.

Watson testified that, if a waiter or waitress could not report for work, he or she was required to notify the host or to find a replacement. If this requirement was not fulfilled, the employee would be terminated. Watson said that, in extreme emergencies, management had excused a waiter from covering an assigned shift. As an example of an employee who was discharged for missing a shift, Watson cited the case of Eileen Corrado who did not work two consecutive shifts sometime prior to Pillitteri's discharge. She was discharged for this according to Watson. Watson believed that if Pillitteri had called and had given a plausible excuse for her absence she would not have been fired.

Eileen Corrado testified on the General Counsel's rebuttal. She was employed from June 1980 to July 19, 1981, as a waitress. She testified that once in winter 1981 and again in April 1981 she did not cover a shift but that she was not disciplined in any way. Watson discharged her in July 1981, after the two had an argument over cocktails in another restaurant. Katz told her that he would not rescind the discharge because he had given Watson authority to fire employees and he did not want to undercut his authority. This testimony was not denied and I credit it.

Watson was a confused witness who gave inconsistent and shifting testimony on a number of topics such as the scope of his authority at the Maestro and the circumstances of Corrado's discharge. Further, Corrado credibly testified that she was not fired for missing a shift, as Watson maintained, but because she had an argument with Watson. Thus, I do not find that Watson is a credible witness.

Host Barbara Maxon testified that, on December 23, she asked Pillitteri what her plans were for the holidays. Pillitteri said she was staying in the city but would not be at the Maestro. She told Maxon she had spoken to Lawrence Watson and that she had been similarly absent last year at Christmas. Pillitteri said that she had enough seniority for management to cover her shift, and that she would "wait and see if she had a job when she came back or not." Maxon did not approve Pillitteri's plans.

tions directed to her were on other subjects, giving the impression that she was determined at all costs to mention the Union repeatedly in her testimony. Pillitteri pretended not to understand some questions so that she could avoid answering them and she fenced with counsel constantly. Her testimony was characterized by numerous shifts and changes. As a result, I hesitate to rely on her testimony and I find that her credibility is not very strong.

On December 24, Maxon told Katz about her conversation with Pillitteri and he asked her to put it in writing.

Maxon left the Maestro in August 1982, and was living and working in California at the time of the trial. She testified that, while she was working at the Maestro, she cleaned Katz' house on her days off. A careful reading of her testimony shows that the waitress was well prepared by counsel. However, I cannot find any grounds to discredit Maxon as the General Counsel would have me do, and I have decided to credit Maxon's testimony.

Katz testified that he decided to discharge Pillitteri after consulting with counsel. He fired her because she did not come to work and issued a challenge, "I dare you to fire me." Both Maxon and Watson related their conversations with Pillitteri to Katz and after speaking with counsel, Katz decided to terminate Pillitteri. Counsel helped him formulate the discharge telegram.

Katz did not wait to investigate Pillitteri's absence before terminating her because there was no honest mistake or misunderstanding involved. She had made an announcement before hand, "Manny can go ahead and fire me if he wants." When Katz had first heard about the Union he had consulted labor counsel and he had been advised to document everything that happened at the Maestro. Once the Union came in all the rules changed. He had to send telegrams and the "family" disintegrated. Pillitteri had issued a direct challenge to him and she had not talked to him about her desire to be absent before the night of December 24 so that he was put on notice of it.

Katz recalled that Pillitteri spoke at the October staff meeting and that she complained about communications breaking down: She no longer felt comfortable, the place was like a prison camp with no more comradery. She also alluded to a food problem, but Katz thought her main complaint was about a breakdown in communications. Katz recalled that she got support in her statements from her fellow workers. Katz said he would like to talk to her later about her complaints and he also asked why she stayed if it was as bad as all that. Katz claimed that she was not angered by the criticisms expressed by Pillitteri and others at the October staff meeting nor did he connect these criticisms with the Union's organizing effort until he met with counsel, about a week after receiving the Union's telegram. In response to my question about the October staff meeting, Katz said that he felt Pillitteri's comments were relevant and that "she was right on target." He thought there was something wrong with the Maestro.

Katz often heard at the Maestro that employees were having a union meeting before the election. He received his information from Watson, Tree, and the kitchen help. He generally heard nothing about what occurred at these meetings but once he was told that Burman had talked about him. He was not told who attended the meetings and, except for Richie Goode in the kitchen, he did not know who had distributed the union cards. Katz once saw a whole group leave Stevens' apartment after a union meeting. By then, he had surmised who was for the Union. Katz never thought Pillitteri was strong for the Union.

A number of witnesses testified about the union campaign at the Maestro.¹³ When asked to name the most active union supporters at the restaurant, including those who solicited authorization cards and spoke out at meetings, the witnesses named Stacy Liddell, Marian McDonald, Arlene Monahan, Mary Lee Stevens, Janet Pennybacker, and Helaine Koffler. None of the witnesses named Pillitteri; indeed, the General Counsel does not contend that she was in the forefront of the organizational campaign. Further, many of the witnesses called by both the General Counsel and Respondent agreed that, by the end of the campaign, it was generally known which employees were strong supporters of the Union and active in its behalf. The employees did not try to hide their allegiance once the Union made its demand for recognition; Mary Lee Stevens who lived next door to the Maestro held several union meetings in her apartment. At least one such meeting ended right before the dinner shift and all the employees walked out of Stevens' house together in full view of Katz who observed them from his post inside the restaurant.

Pillitteri testified that the policy of Respondent was that, if an employee wanted to miss a scheduled shift, he or she had to cover the shift. Pillitteri said there were times when she could not come in when she spoke to management and was released from duty. On one occasion when she was sick with a high fever, she called Tree and told him she would not come in because she was very sick and he excused her. During the same illness, Katz released her from duty one night even though she had not obtained a substitute. Several other times, according to Pillitteri, various emergencies had prevented her from working and she had been excused when she telephoned the Maestro and explained that she would be unable to work. The testimony of other witnesses accords with Pillitteri's summary of Respondent's policy on covering missed shifts.¹⁴ Thus, I find that, contrary to Katz' testimony, employees who missed shifts without obtaining substitutes were excused in exigent circumstances or if they had telephoned the Maestro before the shift and had been excused by one of the managers.¹⁵ Other witnesses, for example McDonald, stated that they had apologized to Katz and had been warned when a scheduled shift was inadvertently not covered by a substitute.

I also find that the waiting staff knew that it was important not to miss a scheduled shift and that it was necessary to obtain a substitute. Arlene Monahan, a witness called by the General Counsel, testified that she had been told by management that an employee who did not

cover a shift could be discharged. Pillitteri tried for weeks to find a substitute for December 24. Other witnesses, for example McDonald, stated that they had apologized to Katz and had been warned when a scheduled shift was inadvertently not covered by a substitute.

The General Counsel, conceding that Pillitteri was not a leading activist, does not contend that she was discharged for any organizing activities. However, the General Counsel urges that, because Pillitteri made a speech at the October staff meeting about poor working conditions and because Katz received a demand from the Union a week or two after the speech, Katz must have connected the two events and concluded that Pillitteri was involved in bringing the Union to the restaurant. Thus, when Katz discharged Pillitteri at the end of December, according to the General Counsel, his motive was that she had engaged in concerted activity and she was connected somehow to the union campaign.¹⁶

In reaching a decision whether Pillitteri was discharged for her protected activities, I have been aware of the difficulties posed by the fact that the testimony of the major witnesses was not very reliable. After weighing all the testimony and evidence, and considering the probabilities, I have concluded that the General Counsel has not shown a connection between Pillitteri's comments at the October staff meeting and her discharge for missing a scheduled shift on Christmas Eve later that year. Pillitteri herself testified that Katz remained friendly in his attitude toward her and the other employees after the staff meeting; his attitude became formal and withdrawn after the Union's telegram a week later. All the witnesses agree that Pillitteri was not known as a strong union supporter. Other employees who were very active in soliciting support for the Union were not discharged or disciplined in any way. Approximately 10 weeks elapsed between Pillitteri's speech and her discharge, long enough for Katz to realize that Pillitteri was not the cause of the Union's presence at the Maestro and long enough for any resentment he may have felt at her remarks to be subsumed in whatever feelings he had about the union effort in general. Moreover, even if I were to find that Katz discharged Pillitteri in part because of her protected activity, I would also find that the discharge would have taken place in any event, even in the absence of such activity.¹⁷ Pillitteri decided to absent herself from work on Christmas Eve 1981, in violation of a well-established policy requiring her to obtain a substitute. She knew that she was treading dangerous ground yet she told Maxon that management should cover her shift and that she would see if her job still existed when she came back. Pillitteri also called Watson and told him that, although she was not sick and had no other excuse, she was not coming in.¹⁸ The evidence shows that Mae-

¹³ The witnesses whose testimony I rely on in this connection are Marian McDonald, Helaine Koffler, Richard Goode, and Mary Lee Stevens.

¹⁴ Among the witnesses whose testimony I credit in this regard are Burman, Stevens, Reed, Koffler, and McDonald.

¹⁵ I also find inaccurate, and thus do not credit, the testimony of Katz and Watson that a number of employees were discharged for failing to appear for a shift without having obtained a substitute. Many of the employees named in this connection were short-term employees and Respondent could not furnish any details as to their termination nor could it establish exact dates of hire and discharge for the employees. Moreover, quite detailed testimony as to the discharge of Corrado was shown to be inaccurate.

¹⁶ Citing *Superior Micro Film Systems*, 201 NLRB 556, 562 (1973); *System Analyzer Corp.*, 171 NLRB 45, 50 (1968).

¹⁷ *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469. (1983), *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

¹⁸ I credited only so much of Watson's testimony as agrees with Pillitteri's version of the events.

astro employees were excused from missing shifts in case of illness or other situations where the absence was not willful. Here the absence was both premeditated and willful, and I believe Katz would have fired Pillitteri even if there had been no union campaign.

G. Alleged Statements by John Tree

After the first union meeting at Stevens' house in early November, according to Pillitteri, Tree said to her, "So, you people think you're all being so smart, don't you, about this union thing? . . . you should know there's a spy in your ranks because Manny knew all about that meeting you had today." Tree said Katz had asked him why he had not informed management about the meeting. One week later, Tree told Pillitteri that the head busboy was being paid to spy on the Union. Later, Tree told Pillitteri, "We all know that you and Janet started the union." Pillitteri testified that she was friendly with Tree and saw him socially with his girlfriend. She often was a guest in his apartment.

On cross-examination, Pillitteri gave a totally different version of these conversations; she quoted Tree as saying that Katz was paranoid and believed that Tree was talking union with the waitresses. Tree told Pillitteri that spying was unfair and that she should not have to look over her shoulder. Pillitteri never discussed the union meetings with Tree. However, before the authorization cards were signed, Pillitteri voiced complaints about the Maestro to Tree and Tree mentioned that he had worked at union establishments and that unions could provide benefits to workers.

Richard Goode, a chef at the Maestro until June 1982, testified that he knew Tree socially. They parted together. They went out together before and after the union campaign, as did many other staff members. Tree often sided with the employees in discussing management policies. Tree sent Goode drinks while he was working in the kitchen even though this was forbidden by management, and he got Goode his next job after the latter left the Maestro. I do not find that Pillitteri's testimony about Tree's alleged statements is reliable. Not only did Pillitteri contradict herself in giving this testimony, but she was extremely reluctant to answer counsel's questions on cross-examination and gave the impression of giving answers based on a whim and not on her recollection. As a result, I do not find that Tree made the statements attributed to him by Pillitteri.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act when it coercively interrogated its employees.
4. Respondent violated Section 8(a)(1) of the Act when it warned its employees not to discuss the Union at work.
5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. No other violations of the Act were committed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent, having sold its business, should be ordered to mail notices to those employees who were employed at the time the unfair labor practices found herein were committed.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Maestro Cafe Associates, Ltd., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities.

(b) Warning employees not to discuss the Union at work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Mail to the last known address of each employee of the Maestro Cafe employed during the months of October, November, and December 1981 and January 1982 copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be mailed to the employees above described immediately upon receipt thereof. Proof of such mailings, with the names and addresses of the persons to whom the notices were mailed, and the date of such mailings, shall be furnished to the Regional Director for Region 2 within 5 days after such notices are mailed.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT question our employees concerning their union activities.

WE WILL NOT warn our employees not to discuss the Union at work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by the Act.

MAESTRO CAFE ASSOCIATES, LTD.